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Ralph Leroy Menzies v. Hank Galetka, Utah State Prison Warden : Reply Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

RALPH LEROY MENZIES, Petitioner/Appellee/Cross-Appellant, vs. HANK GALETKA, Utah State Prison Warden, Respondent/Appellant/Cross-Appellee.	Case No. 20040360-SC

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE PAT BRIAN

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LIST OF PARTIES

The parties are accurately identified in the caption.

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SUMMARY OF ARGUMENT

At issue in this appeal is the interpretation and application of Rule R. 25-14-3(2) of the Utah Administrative Code, which provides: "All appointed counsel agree to accept as compensation for the legal services performed and litigation costs incurred the amounts provided in the Schedule of Payments of Attorneys Fees found in Section R25-14-4."[1] Menzies suggests in his brief that the Court lacks jurisdiction over this appeal because the Division does not appeal from a final order. He also argues that the Division of Finance (the "Division") has failed to apply Utah Administrative Code R. 25-14 (2002) (the

[1] While the Division concedes that it has a statutory responsibility to pay for the costs of persons sentenced to death who pursue post-conviction remedies, it does not concede that Rule 65C applies to this case or that this case is appropriately subject to the Post-Conviction Remedies Act. The Division does not challenge, and indeed likely is not in a position to challenge, however, any previous rulings the trial court may have issued on the subject.

"Rule"), consistently, and that the Rule should not be read literally, but should be construed to reach the conclusion he favors. Menzies' arguments fail for several reasons.

First, the Division appeals from a final order. The order appealed from resolved the fee controversy between the parties. The order is on a separate and distinct issue from the post-conviction case, and although the trial court may retain jurisdiction over any post-conviction proceedings, the payment issue controversy has been fully resolved as to all the parties. Accordingly, the Division appeals from a final order.

Second, the Division has applied the Rule to Menzies consistent with its past interpretation and application. The Division takes the same position here as it has in virtually every other case: that counsel agree to accept the payments in the Schedule of Payments of Attorney Fees as payment for attorneys fees and all litigation costs, other than costs of investigators, expert witnesses, and consultants. The one instance the Division deviated from this interpretation and application was a mistake; the Division is not required to be bound by past mistakes in applying the Rule in future circumstances.

Finally, established rules of statutory construction that also apply to administrative rules require that the Rule be read literally and be applied as written, unless such a reading is unreasonably inoperable or confused. Because Menzies has not identified how the Division's interpretation and application of the Rule is unreasonably inoperable or confused, it must be read literally. When read literally, it is clear that Menzies is not entitled to separate, additional payments for transcript and printing costs.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL BECAUSE THE DIVISION APPEALS FROM A FINAL ORDER OF THE DISTRICT COURT.

Menzies first argues that "it is questionable" whether this appeal is taken from a final order. Appellee's Brief at 1. The order appealed from may not be final, he argues, because it only resolved some of the issues between all the parties. *Id.* at 1-2. The Court does have jurisdiction over this appeal, however, because it is from a final order that resolved the fee controversy between the relevant parties.

Under the final judgment rule, an appeal is improper if it is taken from an order or judgment that is not final. Utah R. App. P. 3; *Shaw v. Layton Constr. Co.*, 854 P.2d 1033 (Utah Ct. App. 1993). Generally, for a judgment or order to be final it "must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case." *Kennedy v. New Era Indus., Inc.*, 600 P.2d 534, 535-36 (Utah 1979). A final order ends the controversy between the parties. *Id.* "Whether an order is deemed a 'final order' is not necessarily dependent in all instances upon whether all issues in a lawsuit have been adjudicated. The test to be applied is a pragmatic test." *First of Denver Mortgage Investors v. C. N. Zundel & Assocs.*, 600 P.2d 521, 528 (Utah 1979).

The Division appeals from a final order. The order resolved all issues with respect to payment of fees and costs under the Rule. In addition, the trial court disposed of the

merits of the case by denying Menzies relief from summary judgment. Menzies appealed the order denying relief from summary judgment at virtually the same time the Division appealed the transcript payment order. No issue in either the post-conviction or transcript proceedings remained alive. The entire controversy between all of the parties was over. Accordingly, the Division appeals from a final order.

In any event, Utah recognizes that an order may be final even though the court retains jurisdiction for other purposes. For example, in child welfare cases, the juvenile court exercises continuing jurisdiction even though it enters what is considered a final, appealable order of neglect. *See State ex rel. E.M.*, 922 P.2d 1282, 1284 (Utah Ct. App. 1996). "Following a neglect adjudication, the juvenile court continues to have jurisdiction over and periodically reviews the case," even though the neglect adjudication is a "final factual determination" of the original petition and is appealable. *State ex rel. M.W.*, 2000 UT 79, ¶26, 12 P.3d 80 (citation and quotation marks omitted). Nevertheless, the juvenile court "retains jurisdiction over the child who is the subject of a neglect, abuse, or dependency petition to conduct a dispositional review hearing." *Id.* at ¶26 n.9. Resolution of the custody petition does not affect the finality of the neglect adjudication because the petitions are separate and distinct. *Id.* at ¶24. Accordingly, the neglect adjudication would be final and appealable while the trial court retained jurisdiction over

the custody petitions.[2]

Similarly, a district court in divorce proceedings retains continuing jurisdiction to make subsequent changes or new orders as a result of material changes in circumstances. *See White v. State*, 795 P.2d 648, 650 (Utah 1990). The result is that several orders in a single case may be final and appealable. *Id.* An analogous situation also exists in judgments of contempt. A judgment of criminal contempt is considered to be a final order separate from ongoing proceedings and appealable as a matter of right. *Von Hake v. Thomas*, 759 P.2d 1162, 1167 (Utah 1988). Just as a neglect adjudication settles all factual matters concerning the alleged abuse or neglect, a criminal contempt judgment settles all factual matters as to the conduct giving rise to an order of contempt.

Although the transcript payment issue is a separate and distinct issue from the post-conviction proceedings, it did not affect the merits of the post-conviction case, it

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[2] The related collateral order doctrine provides that an order that finally adjudicates collateral matters in a case is final and appealable with regard to those collateral matters. Although when presented with the collateral order doctrine, the Court, so far, has refused to apply it as an exception to the final judgment rule, this unique case would merit its application. *See Tyler v. Dept. of Human Srvcs.*, 874 P.2d 119, 119 (Utah 1994) (refusing the apply the collateral order doctrine to allow an appeal of an order of the district court compelling discovery) The collateral order doctrine was first applied by the United States Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The *Cohen* court held that, in a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" may be considered "final" for purposes of appeal. Given that the statute requires the Division to pay for costs of appeal, it is imperative to get a ruling clarifying the Division's full payment responsibilities under the Rule before an appeal on the merits is concluded.

resolved the claims of the parties as to the payment of transcripts, and is a final, appealable order just as in child welfare, divorce, and criminal contempt proceedings. Even though the trial court may have continuing jurisdiction to issue orders in certain aspects of the post-conviction case, the transcript payment order is final and appealable because it resolved the separate and distinct fee controversy. The transcript payment order contemplated no further action in the case and in this respect is final.

Menzies argues, nonetheless, that the Division has continued to litigate the case in the trial court since entry of the order. Appellee's Brief at 2, n.1. He points specifically to the Division's objection to his request for transcripts and designation of record, and a motion, filed by Menzies himself, for extraordinary payment of counsel pursuant to Utah Administrative Code R. 25-14-4(6). *Id.* Neither action, however, changed the finality of the transcript payment order.

The Division's objection to Menzies' request for transcripts and designation of record is related solely to the appeal, and absent an appeal even being filed, would not be at issue. The State filed a similar objection in the post-conviction appeal that was ruled on by the Court. *See* Appellant's Brief at Appendix "B." It is illogical that an order that is otherwise final can somehow be converted to a non-final order, and therefore non-appealable, because of issues that may arise during the appeal and that are related solely to the appeal.

Similarly, Menzies' motion for extraordinary payment of counsel does not affect

the finality of the order appealed from here. All controversy over the payment of fees and costs was resolved by the trial court's order requiring the Division to pay for transcripts. At the time appeals were filed, there was no live issue on this topic remaining in the district court.

The Rule does provide for additional payment of fees if the district court finds "that the appointed counsel provided extraordinary legal services that were not reasonably foreseeable at the time of accepting the appointment . . . ." Utah Admin. Code R. 25-14-4(6)(b)(1) (2002). The extraordinary payment of fees may be made at any time the Rule's requirements are met, including *after* the filing of an appeal. Counsel does not, however, have a right to nor an expectation of extraordinary payment of fees.

Menzies' argument, if accepted, would allow a post-conviction petitioner to, in essence, convert a final order that is otherwise appealable into a non-final order that deprives an appellate court of jurisdiction. Menzies' arguments would allow a petitioner to play with the final judgment rule to effectively prohibit any appeals on this issue. The Division would face an impossible choice: either file an appeal of an order under the Rule to preserve its appeal rights with the hope that a petitioner does not move for extraordinary payment of fees, and thereby deprive the appellate court of jurisdiction, or wait to file an appeal and hope that petitioner files a motion for extraordinary payment of fees. In the event no motion for extraordinary payment is filed, the Division would then lose its appeal rights for not filing a notice within the proper time of entry of a final,

appealable order. Certainly this absurd result is not one intended by the final judgment rule.[3]

In short, the order appealed from here is a final order. The order resolved the fee controversy between the parties, and is on a separate and distinct issue that does not affect the merits of the case.

II. THE DIVISION'S PRIOR ADMINISTRATION AND APPLICATION OF ITS ADMINISTRATIVE RULE HAS BEEN CONSISTENT AND IS CONSISTENT WITH ITS ACTIONS IN THIS CASE.

Menzies argues that the Division's interpretation and application of the Rule should be accorded no deference because it has inconsistently applied the Rule. Appellee's Brief at 17-24. State agencies are generally given "considerable latitude of discretion in deciding what policies will best carry out the responsibilities imposed upon it." *Colman v. Utah State Land Bd.*, 403 P.2d 781, 784 (Utah 1965). In fact, an administrative interpretation and application of a statute "is generally regarded as prima facie correct and not to be overturned so long as it is in conformity with the general objectives the agency is charged with carrying out, and there is a rational basis for it in the provisions of law." *Id.*

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[3] Nonetheless, to prevent such an absurd result, this case would fit within the "extraordinary cases exception" to the final judgment rule. Under the extraordinary cases exception, the Court "may choose to treat a purported [appellate rule 3 appeal of right] as an interlocutory appeal under [appellate rule 5]." *A. J. Mackay Co. v. Okland Constr. Co., Inc.*, 817 P.2d 323, 325 (Utah 1991) (quoting *Williams v. State*, 716 P.2d 806, 808 (Utah 1986)).

While an agency has an obligation to consistently apply its rules, the Division is not required "to be bound in future circumstances by past mistakes." *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 52 (Utah 1988). The notion that an administrative agency is bound to follow past mistakes, the Court has ruled, is "unacceptable." *Id.*

The *Williams* decision is instructive. In *Williams*, plaintiff appealed the Public Service Commission's (the "PSC") denial of his application for a certificate of public convenience and necessity. Plaintiff argued that the PSC improperly and arbitrarily reversed its long-standing policy of regulation of one-way paging services by changing its administrative rule. After agreeing that the PSC's interpretation of the statute was rational and reasonably based, the court pointed out that plaintiff's position that the PSC did have jurisdiction over one-way paging "would require the PSC to be bound in future circumstances by past mistakes." *Id.* at 50 (citing *Colman v. Utah State Land Bd.*, 403 P.2d 781, 784 (1965)) An analysis, the court, deemed "unacceptable." *Id.* The court concluded that the PSC "is not prevented from reversing its previous practice of exercising jurisdiction over one-way paging services." *Id.*; *see also Colman*, 403 P.2d at 784 (holding that "deviation from proper procedure in prior cases would not commit [an agency] irrevocably to continue doing so [, a]nd it certainly would give the plaintiff no right to compel persistence in such impropriety").

Of all the payments that have been made over the past several years in post-conviction cases, Menzies points to only one instance, over two years ago, where the

Division actually paid two bills for "transcript expenses." *See* Appellee's Brief, Appendix at 003851-003856. This amounts to nothing more than a single oversight by the Division, not a pattern of inconsistent application. Menzies points to no other instance where the Division has separately paid for transcript expenses.

Menzies also points to an electronic mail message from a Division employee to Menzies' legal counsel to show inconsistent application of the Rule. The message, however, does nothing to support his argument. The message simply states that if Menzies' legal counsel was to get a court order, the Division "should be able to pay [an invoice for transcripts]." Appellee's Appendix at 003857. The e-mail only shows that the Division would consider payment. It never did separately pay for that expense. In short, the Division is not bound to apply the Rule in future circumstances consistent with a single mistake made over two years ago. Rather, the Division has applied the Rule consistent with its interpretation in this case.

III. THE ADMINISTRATIVE RULE MUST BE INTERPRETED LITERALLY AND BE HELD TO MEAN WHAT IT SAYS.

Menzies does not disagree that the Division's interpretation of its rule is correct. Rather, he argues that the rule cannot "be read literally as the final word on the issue . . . ." Appellee's Brief at 21. He urges the Court to harmonize the rule and other legal provisions to "insure that qualified counsel are given adequate compensation for representing capital clients in state post-conviction proceedings, and that reasonable

litigation expenses are paid from state funds by the Division of Finance."[4] *Id.*

Administrative rules, like statutes, should generally be construed according to their plain language. *Archer v. Board of State Lands & Forestry*, 907 P.2d 1142, 1145 (Utah 1995) (using rules of statutory construction in construing administrative rules). Thus, in reviewing a statute or administrative rule, courts are to "read each term literally unless such a reading is unreasonably inoperable or confused." *Id.* In construing a statute, as well as an administrative rule, the Court has repeatedly recognized that:

> We need look beyond the plain language only if we find some ambiguity. . . . In analyzing a statute's plain language, we must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms. . . . However, if we find a provision that causes doubt or uncertainty in its application, we must analyze the act in its entirety and harmonize its provisions in accordance with the legislative intent and purpose. . . . Nevertheless, a statute's unambiguous language may not be interpreted to contradict its plain meaning.

State v. Burns, 2000 UT 56, ¶ 25, 4 P.3d 795 (citations and quotation marks omitted); *see also Lyon v. Burton*, 2000 UT 55, ¶17 & n.5, 5 P.3d 616 (recognizing the duty of an appellate court to "avoid interpreting a statute in a manner that renders portions of the

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[4] Although Menzies agrees that the amount of the payments provided in the Rule is not before the Court in this appeal, the payment amounts appear to form the sole basis for his argument. He asks the Court to overlook the plain language and read the Rule to "insure that qualified counsel are given adequate compensation for representing capital clients in state post-conviction proceedings, and that reasonable litigation expenses are paid from state funds by the Division fo Finance." Appellee's Brief at pg. 21. The Court generally does not rule on issues not properly before it. *See State v. Redd*, 1999 UT 108, ¶11, 992 P.2d 986 (expressly reserving judgment on an issue not properly before the Court). The issue of the payment amounts is not properly before the Court because Menzies has not followed the required statutory and administrative procedures to amend an administrative rule. *See* Utah Code Ann. § 63-46a-12.1 (West 2004).

statute, or related statutes, meaningless"). Applying these principles to the Rule establishes that the payments pursuant to the Rule's Schedule of Payment of Attorneys Fees is for both legal services performed and litigation costs incurred.

The Rule provides that appointed counsel in post-conviction proceedings "agree to accept as full compensation for the legal services performed and the litigation costs incurred the amounts provided in the Schedule of Payments of Attorneys Fees found in R25-14-4." Utah Admin. Code R. 25-14-3(2) (2002). Menzies has failed to show that a literal interpretation of the Rule is unreasonably inoperable, confused or ambiguous. A literal interpretation of the Rule and the Division's application is in harmony with the statute because it provides payment for the two expenses expressly enumerated in the statute: costs of counsel and reasonable litigation expenses.

The Rule's provision for payment of expert witnesses, consultants, and investigators is equally unambiguous when read literally. The Rule provides that the Division "shall pay reasonable litigation expenses not to exceed a total of $20,000.00 in any one case for court approved investigators, expert witnesses, and consultants." Utah Admin. Code R. 25-14-5 (2002). The list of covered expenses is exclusive and does not, by the Rule's plain terms, include payment for transcripts, printing, copying, or other ordinary litigation expenses. This part of the Rule is not ambiguous, nor is it unreasonably inoperable or confused.

Finally, Menzies argues that the Division has "substantial leeway to apply or

ignore one or the other element [sic] of the rule in any given case." Appellee's Brief at 23. The Rule is clear, however, as to when the Division is required to make any payment and in what amount.[5] The Rule allows the Division no discretion because it is either bound by the Rule's terms or a court order requiring payment. *See* Utah Admin. Code R. 25-14-4(6)(b) (2002) (requiring a district court order for payment of extraordinary legal services). Similarly, legal counsel can read the Rule and know, before accepting appointment, what amounts will be paid and when those payments will be made. Legal counsel know what funds are available and they are then given the discretion on how to use those funds to best present a petitioner's case. The Division administers the Rule's payment provisions only; it does not make value based decisions on expenses. In this respect, a literal interpretation and application of the Rule virtually requires the Division to consistently apply the Rule.

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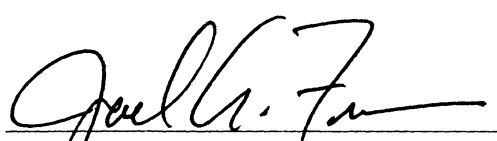
[5] Menzies alternatively argues that the District Attorney's Office or Respondent should be required to provide and pay for the transcripts. The Division accepts its statutory responsibility to pay fees and costs in post-conviction cases. If the Court rules in the Division's favor, then Menzies has already received payment for copying, printing, and transcript costs. If the Court rules in Menzies' favor, then the Division is responsible for paying these costs from the $20,000 fund for investigators. Regardless, Menzies has no claim against either the County or Respondent for copying, printing, and transcript costs for his post-conviction case.

CONCLUSION

For the above reasons, the Court should vacate the trial court's order and remand for further proceedings.

RESPECTFULLY SUBMITTED this 2nd day of February, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2005, I mailed, first-class postage prepaid, two copies of the foregoing Reply Brief to[6]:

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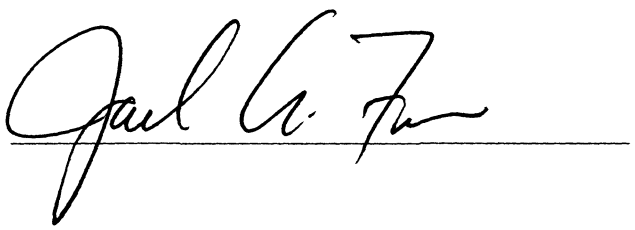

[6] Menzies' counsel complains that she received a copy of the Division's brief late because it was mailed to the wrong address. Menzies' counsel apparently has had several different addresses during the course of this appeal, yet has failed to routinely informed Division's counsel of those changes of address. The Division mailed a copy of its brief to the last known address it had for Menzies' legal counsel.